(3)

Supreme Court, U.S.
FILED
DEC 11 1991
OFFICE OF THE CLERK

91-1164

No. _____

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEVADA, NEVADA DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION,

Petitioners,

v.

SCOTSMAN MANUFACTURING COMPANY, INC.,

Respondent.

Petition For Writ Of Certiorari To The Nevada Supreme Court

BRIEF IN OPPOSITION

RECEIVED
DEC 13 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

GUILD & HAGEN, LTD.
DAVID W. HAGEN, Esq.
Suite 800
100 W. Liberty Street
P.O. Box 2838
Reno, Nevada 89505
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pr

TABLE OF CONTENTS

Page

INTRODUCTION AND STATEMENT OF THE CASE . 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT 2

THE PETITION IS FATALLY FLAWED..... 2

THIS COURT WILL NOT REVIEW A STATE COURT FACT QUESTION..... 3

BECAUSE THE PETITION IS FRIVOLOUS, SCOTSMAN SHOULD BE AWARDED ATTORNEY FEES AND COSTS..... 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Christman v. Miller, 197 U.S. 313 (1905) 4

Kern-Limerick, Inc. v. Scurlock, 342 U.S. 110 (1954) ...1, 3

Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U.S. 613 (1898) 4

Scotsman Manufacturing Company v. The State of Nevada, et al., 107 Nev. Adv. Op. 22, 808 P.2d 517 (1991) 1

United States v. New Mexico, 455 U.S. 720, 741-742 (1982) 1, 2, 3

OTHER AUTHORITIES

Sup. Ct. R. 10.1 5

Sup. Ct. R. 10.1(c) 1, 3

Sup. Ct. R. 42.2 ..... 2, 4

Sup. Ct. R. 43 4

28 U.S.C. § 1257 4

United States Constitution (art. VI, cl. 2) 1, 2

INTRODUCTION AND STATEMENT OF THE CASE

The ruling complained of, *Scotsman Manufacturing Company v. The State of Nevada, et al.*, 107 Nev. Adv. Op. 22, 808 P.2d 517 (1991), decides a federal question in a way that is consistent with the applicable decisions of this Court. See Sup. Ct. R. 10.1(c). The question presented there was:

> Did the [trial court] err in its determination that tangible personal property [housing modules] purchased by a federal contractor and paid for by the United States in which title vested immediately pursuant to the contract was not exempt from the Nevada Sales Tax Act?

Scotsman's Opening Brief at 5, App. 1.

The Nevada Supreme Court decided that the sale was exempt from the tax because of the Supremacy Clause of the United States Constitution (art. VI, cl. 2) and the rule in *Kern-Limerick, Inc. v. Scurlock*, 342 U.S. 110 (1954), construed in *United States v. New Mexico*, 455 U.S. 720, 741-742 (1982). *Scotsman v. Nevada*, 808 P.2d at 519, 521. The case was remanded to the trial court for entry of summary judgment in respondent's favor. *Id.* at 521.

SUMMARY OF ARGUMENT

1. Petitioners taxed the sale of housing modules built in California by respondent, and sold and delivered by respondent in Nevada to the United States through its prime contractor, Reynolds Electrical and Engineering Corporation, Inc. By the sales contract the goods were

paid for out of United States' funds and title to them passed directly to the United States. The tax on the sale violates the Supremacy Clause of the United States Constitution (art. VI, cl. 2).

2. Petitioners' suggestion that the federal contractor was sufficiently distinct from the government so as to subject the sale to the tax impermissibly invites the Court to determine a factual issue.

3. The petition is frivolous. Therefore, respondent asks for just damages under Sup. Ct. R. 42.2.

ARGUMENT

THE PETITION IS FATALLY FLAWED

Petitioners flatly deny the law. Their SUMMARY OF ARGUMENT gives as its only ground that the Nevada Supreme Court misreads *United States v. New Mexico* "to create a dual set of distinct analyses" for application, one to a use tax, the other to a sales tax. (Petition at 10.) But that is exactly what *New Mexico* does; petitioners avoid the opinion's central and plainly worded distinction between sales and use taxes:

> Unless the entity as a whole is one of the Government's "constituent parts," then, a tax on its use of property should not be seen as falling on the United States; in that situation the property is being used in furtherance of the contractor's essentially independent commercial enterprise. In the case of a sales tax, however, it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the

> purchase, as to make the sale – in both the real and a symbolic sense – a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure. Such was the court's conclusion in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954). . . .

United States v. New Mexico, 455 U.S. at 741-742.

Hardly unaware of those words, but never distinguishing or acknowledging them, petitioners stubbornly insist that *New Mexico* "establishes" but one test for the imposition of either tax, sales or use, to the federal contractor's purchase of goods. (Petition at 16.) Denial of the rule of the case does not qualify as reasoned argument[1] and should be disregarded.

In sum, the petition does not meet the charge of Sup. Ct. R. 10.1(c); the federal question decision complained of is not in conflict with any applicable decision of this Court.

THIS COURT WILL NOT REVIEW A STATE COURT FACT QUESTION

The Nevada Supreme Court decided this case in the knowledge that:

---

[1] It is also not one petitioners can innocently make. *New Mexico* reaffirms *Kern-Limerick*, a case that is well known to Nevada's taxing authorities. In *United States v. Nevada Tax Commission*, 291 F. Supp. 530 (D. Nev. 1968), aff'd, 439 F.2d 435 (9th Cir. 1971), the district court identified *Kern-Limerick* as forbidding a sales tax under virtually identical payment-title passage terms in a federal procurement contract. *Id.* at 291 F. Supp. 532.

1) at sale title passed directly to the United States, paid for from funds of the United States; and

2) the parties were deemed to have agreed before the trial court (by cross-motions for summary judgment) that there were no genuine issues of material fact. Trial Court's Judgment at 2, App. 2.

Petitioners now affect a factual issue: whether the federal contractor may have been sufficiently distinct from the federal government to make the sale taxable. The issue is past raising. But even if it were not, petitioners may not seek such review here. See 28 U.S.C. §1257. State court fact questions will not be considered by this Court. *Missouri, Kansas & Texas Ry. Co. v. Haber,* 169 U.S. 613 (1898). This Court accepts state court fact determinations as final. *Christman v. Miller,* 197 U.S. 313 (1905).

BECAUSE THE PETITION IS FRIVOLOUS, SCOTSMAN SHOULD BE AWARDED ATTORNEY FEES AND COSTS

Petitioners have not headed the warning Sup. Ct. R. 42.2 gives against frivolous petitions. Respondent's just damages caused by the petition are its attorney fees, Sup. Ct. R. 43 costs and the cost of printing and serving this opposition.

CONCLUSION

No special or important reason exists to grant the petition. See Sup. Ct. R. 10.1. It is respectfully urged that it be denied, and that respondent be awarded just damages.

Dated: December 11, 1991.

GUILD & HAGEN, LTD.
DAVID W. HAGEN
100 W. Liberty St., #800
Reno, Nevada 89505

Attorneys for Respondent

APPENDIX

Page

Excerpt From Scotsman's Opening Brief below at 5.....App. 1

Excerpt From the Trial Court's Judgment below at 2.....App. 1

From Scotsman's Opening Brief below at 5 (highlighting added):

QUESTION FOR REVIEW

I. **Did the district court err in its determination that tangible personal property purchased by a federal contractor and paid for by the United States in which title vested immediately pursuant to the contract was not exempt from the Nevada Sales Tax?**

STATEMENT OF THE CASE

1. NATURE OF THE CASE AND PRIOR PROCEEDINGS.

This is an action for judicial declaration that the sale by appellant Scotsman Manufacturing Company, Inc. ("Scotsman") to the United States of America through its agent, respondent Reynolds Electrical and Engineering Company, Inc. ("REECO"), of personal property paid for by the United States in which title vested immediately is exempt from the Nevada Sales Tax Act. ROA 1-8.

From The Trial Court's Judgment below at 2 (highlighting added):

Summary Judgment is appropriate when no genuine issues of material fact remain for trial and one party is entitled to judgment as a matter of law. See *Hampton v. Brewer*, 103 Nev. 73, 733 P.2d 852 (1987). All parties agree on the facts of this case and therefore summary judgment properly lies.

Scotsman extensively briefed the distinction between use tax and sales tax. The court agrees with Scotsman that

a use tax, in this case, is improper. See Nevada Tax Commission Ruling 67(1)(c). Scotsman built modular homes in California, to be placed on foundations at the Tonopah Test Site. In light of the above-referenced Ruling 67, Scotsman is clearly a "retailer of tangible personal property" not a construction contractor. . . .

* * *